

Bank Industri Malaysia Bhd v Huston Electronics Co (M) Sdn Bhd & Ors A

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-710-1995
KAMALANATHAN RATNAM JC
12 OCTOBER 1996

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Contract — Guarantee — Demand for payment — Allegation that demand was in excess of the sum claimed — Whether demand was valid and effective

Civil Procedure — Pleadings — Material facts — Demand for payment on guarantee — Allegation that statement of claim failed to particularize mode of computation of interest, rate of interest and time period interest was levied — Whether statement of claim was adequately pleaded C

Contract — Misrepresentation — Guarantee — Guarantors claimed that they had not been advised by creditor's solicitors — Whether guarantee voidable

The plaintiff granted three credit facilities to the first defendant. The action in this case was only for the recovery on the second and the third facilities. The senior assistant registrar granted leave to the plaintiff to enter summary judgment against the second, third and sixth defendants who were guarantors to the second and third facility agreement. The appellants appealed against the decision of the senior assistant registrar. D

The appellants raised several issues. The main issues were that the statement of claim was inadequately pleaded in that it failed to particularize the mode of computation of interest and the rate of interest and the time period for which interest was levied for each of the amounts claimed under the second and third facility agreements. Thus, there was no way of ascertaining whether interest claimed was actually due. The appellants also contended that the plaintiff had demanded for a sum in excess of the sum claimed and that the demand was not valid and ineffective. The appellants also alleged that the guarantees were voidable having been obtained as a result of misrepresentation as they had not been advised by the plaintiff's solicitors as to the consequences of having persons who were beyond the jurisdiction of the court as joint guarantors. The respondent relied, amongst others, on the conclusive evidence clause in the guarantee agreement to bind the second, third and sixth defendants. E

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Held, dismissing the appeal:

- (1) The statement of claim was adequately pleaded. The plaintiff had pleaded the contractual terms regarding interest on which it relied in full, including the rates and mode of computation, the principal amounts due on each facility claimed and the interest rates charged. To plead anything more would be tantamount to pleading evidence (see p 825D-E); *Sundaram v Chew Choo Khoon* [1968] 2 MLJ 153, *Ban Hin Lee Bank Bhd v Jashbhai Nagjibhai* I

- A *Patel* [1992] 1 CLJ 98 followed and *Bajaj Textiles Ltd v Gian Singh & Co Ltd* [1971] 2 MLJ 133 distinguished.
- (2) On the facts, it was apparent that in the letters of demand, the principal and interest due under each of the three facilities had been set out separately. The demand made was for three separate facilities, the amounts under each being clearly identified. Out of the three, this action related to only two of the said facilities and whereas the plaintiff/respondent had also clearly pleaded in the statement of claim that in respect of the first facility the plaintiff/respondent intended to file a separate action to recover the sums due under the said first facility. In the circumstances, the contention of the appellants that the plaintiff/respondent had demanded a sum in excess of that claimed was as unmeritorious as was a bare denial to an action.
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- D Also, in the present case, the amounts due on the principal and interest were all separately set out for each facility in the two letters of demand, thus the appellants were in a position to know exactly what was being demanded of them in respect of the said facilities. Further, on the facts, the plaintiff/respondent had not demanded anything it was not entitled to. Therefore, the letters of demand were valid and effective (see pp 830B–C, I and 831A–B); *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283 and *Donnelly v National Australian Bank* (unreported) followed.
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- (3) The issue of misrepresentation raised by the appellants was also devoid of merit. Since the plaintiff/respondent's solicitors were not representing the appellants, there was no legal duty on them to advise the appellants. Besides, if such was the situation which led to the appellants being misrepresented, the appellants would have or ought to have protested this fact at the earliest opportunity or at least raise it in the affidavits to enable the plaintiff/respondent to rebut. They ought not to have raised it during the submission without any basis (see pp 831I and 832A–B); *Malayan Banking Bhd v Kim Produce Pte Ltd & Ors and another action* [1991] 2 MLJ 448 distinguished.
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Obiter:

- H The presence of a conclusive evidence clause per se could not prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them. However, if the conclusive evidence clause was to be disputed, then there ought to be a proper challenge taken, since the existence of such a clause was prima facie evidence of the debt due. As the
- I second, third and sixth defendants had not alleged nor shown any grounds to vitiate the certificate of indebtedness, the said certificate of indebtedness was held to be conclusive of the sums owed by the appellants (see p 826C–D); *Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors* [1996] 4 MLJ 556 followed.

[Bahasa Malaysia summary]

Plaintif telah memberikan tiga kemudahan kredit kepada defendan pertama. Tindakan dalam kes ini hanyalah untuk mendapat kembali kemudahan kedua dan ketiga. Penolong kanan pendaftar telah memberikan kebenaran kepada plaintif untuk memasukkan penghakiman terus terhadap defendan-defendan kedua, ketiga dan keenam yang merupakan penggerenti perjanjian kemudahan kedua dan ketiga. Perayu-perayu membuat rayuan terhadap keputusan penolong kanan pendaftar.

Perayu-perayu telah membangkitkan pelbagai isu. Isu-isu utama adalah bahawa pernyataan tuntutan tidak diujahkan dengan sempurna sebab ia gagal memperincikan cara pengiraan faedah dan kadar faedah dan jangka masa atas mana faedah dikenakan untuk setiap amaun yang dituntut di bawah perjanjian kemudahan kedua dan ketiga. Oleh itu, tiada cara bagi menentukan sama ada faedah yang dituntut benar-benar harus dibayar. Perayu-perayu juga berhujah bahawa plaintif telah menuntut jumlah yang jauh melebihi jumlah yang dituntut dan bahawa tuntutan itu adalah tak sah dan tidak berkesan. Perayu-perayu juga mengatakan bahawa gerenti-gerenti boleh dibatal memandangkan ia telah diperolehi akibat salah nyata oleh kerana mereka tidak dinasihati oleh peguamcara plaintif tentang kesan mempunyai penggerenti bersama yang berada di luar bidang kuasa mahkamah. Penentang bergantung kepada, antara yang lain, fasal keterangan muktamad dalam perjanjian gerenti supaya mengikat defendan-defendan kedua, ketiga dan keenam.

Diputuskan, menolak rayuan:

- (1) Pernyataan tuntutan telah diujahkan dengan wajarnya. Plaintif telah mengemukakan terma kontraktual mengenai faedah atas mana ia telah bergantung dengan sepenuhnya, termasuk kadar dan cara pengiraan, amaun prinsipal yang harus dibayar ke atas setiap kemudahan yang dituntut dan kadar faedah yang dikenakan. Berhujah lebih daripada itu sama seperti mengemukakan keterangan (lihat ms 825D-E); *Sundaram v Chew Choo Khoon* [1968] 2 MLJ 153, *Ban Hin Lee Bank Bhd v Jashbhai Nagibhai Patel* [1992] 1 CLJ 98 diikuti dan *Bajaj Textiles Ltd v Gian Singh & Co Ltd* [1971] 2 MLJ 133 dibeza.
- (2) Atas fakta-fakta, adalah jelas bahawa dalam surat-surat tuntutan, pokok dan faedah yang harus dibayar di bawah setiap tiga kemudahan telah dinyatakan secara berasingan. Tuntutan yang dibuat adalah untuk tiga kemudahan berasingan, dan amaun di bawah setiap satu telah dikenal pasti dengan jelas. Daripada ketiga-tiga kemudahan, tindakan ini hanya berkaitan dengan dua kemudahan tersebut. Plaintif/penentang juga telah berhujah dengan jelas dalam pernyataan tuntutan bahawa berhubung dengan kemudahan pertama, plaintif/penentang berhasrat memfailkan suatu tindakan berasingan bagi mendapat kembali jumlah yang terhutang di bawah kemudahan pertama tersebut.

- A Dalam keadaan begitu, hujah perayu-perayu bahawa plaintif/penentang telah menuntut suatu jumlah yang melebihi apa yang dituntut adalah tidak wajar dan merupakan hanya suatu penafian asas kepada sesuatu tindakan.
- B Juga, dalam kes ini, amaun yang harus dibayar atas pokok dan faedah kesemuanya dinyatakan secara berasingan untuk setiap kemudahan dalam dua surat tuntutan itu, justeru itu perayu-perayu berada dalam kedudukan untuk mengetahui apa yang dituntut daripada mereka berhubung dengan kemudahan tersebut. Tambahan pula, atas fakta-fakta, plaintif/penentang tidak pun menuntut apa yang ianya tidak berhak menuntut. Oleh
- C itu, surat-surat tuntutan adalah sah dan berkesan (lihat ms 830C–D dan 831A–B); *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283 dan *Donnelly v National Australian Bank* (tidak dilaporkan) diikuti.
- D (3) Isu salah nyata yang ditimbulkan oleh perayu-perayu juga tidak mempunyai merit. Oleh kerana peguamcara plaintif/penentang tidak mewakili perayu-perayu, mereka tidak mempunyai sebarang kewajiban undang-undang untuk menasihati perayu-perayu. Di samping itu, jika begitulah keadaan yang telah menyebabkan perayu-perayu disalah nyata, perayu-perayu akan membantah atau sepatutnya membantah terhadap fakta ini di peluang yang
- E paling awal atau sekurang-kurangnya menimbulkan perkara ini dalam affidavit-affidavit bagi membolehkan plaintif/penentang mematahkannya. Mereka tidak sepatutnya menimbulkannya semasa penghujahan tanpa sebarang asas (lihat ms 831I dan 832A–B); *Malayan Banking Bhd v Kim Produce Pte Ltd & Ors and another action* [1991] 2 MLJ 448 dibeza.
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Obiter:

- Kehadiran suatu fasal keterangan muktamad per se tidak boleh menghalang penggerenti-penggerenti daripada mempersoalkan kebetulan akaun yang ingin dikemukakan sebagai keterangan muktamad terhadap mereka atau sebaliknya. Namun demikian, jika
- G fasal keterangan muktamad dipertikaikan, maka cabaran yang wajar patut diambil oleh kerana kewujudan fasal sedemikian adalah bukti prima facie hutang yang harus dibayar. Oleh kerana defendan-defendan kedua, ketiga dan keenam tidak mengatakan atau menunjukkan sebarang alasan bagi membuktikan sijil keterhutangan tak sah, sijil keterhutangan tersebut diputuskan tidak dapat
- H mempertikaikan jumlah yang terhutang oleh perayu-perayu (lihat ms 826C–D); *Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors* [1996] 4 MLJ 556 diikuti.]

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Notes

For cases on guarantees, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1628–1731.

For cases on pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2506–2772.

For cases on misrepresentation, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1881–1901. A

Cases referred to

- Bajaj Textiles Ltd v Gian Singh & Co Ltd* [1971] 2 MLJ 133 (distd) B
Ban Hin Lee Bank Bhd v Jashbhai Nagjibhai Patel [1992] 1 CLJ 98 (folld)
Burnsbury Foods Pty Ltd v National Bank of Australasia Ltd (1983) 153 CLR 491 (refd)
Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283 (distd)
Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors [1996] 4 MLJ 556 (folld) C
Donnelly v National Australian Bank (unreported) (folld)
Malayan Banking Bhd v Kim Produce Pte Ltd & Ors and another action [1991] 2 MLJ 448 (distd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd) D
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Public Bank Bhd v Chan Siok Lie & Ors [1989] 2 MLJ 305 (refd)
Sundaram v Chew Choo Khoon [1968] 2 MLJ 153 (folld)

Legislation referred to E

Contracts Act 1950 ss 30, 83
 Rules of the High Court 1980 O 14

VL Yiew (YS Chai with him) (*Chai Yow San & Co*) for the appellants/defendants. F

Ira Biswas (GL Ambrose with him) (*Chooi Co*) for the respondent/plaintiff.

Cur Adv Vult

Kamalanathan Ratnam JC: This is an appeal against the decision of the learned senior assistant registrar ('the SAR') given on 12 March 1996 granting leave to enter summary judgment against the second, third and sixth defendants pursuant to O 14 of the Rules of the High Court 1980 ('the RHC'). G

The plaintiff granted three revolving pre-shipment and post-shipment supplier's credit facilities to the first defendant pursuant to the following agreements: H

- (a) By an agreement dated 16 August 1988 ('the first facility agreement') between the plaintiff and the first defendant in the principal sum of RM1,000,000. I
- (b) By an agreement dated 19 January 1989 ('the second facility agreement') between the plaintiff and the first defendant in the principal sum of RM4,000,000.

- A (c) By an agreement dated 16 April 1990 ('the third facility agreement') between the plaintiff and the first defendant in the principal sum of RM2,000,000.

The first defendant having defaulted in the repayment of the loan, this action is only for the recovery on the second and the third facilities and the claim against the second, third and sixth defendants is as guarantors to the second and third facilities. The plaintiff/respondent has pleaded that it proposes to file a separate action for the sum due under the first facility.

The appellants took various issue before me.

- C (a) *Whether the statement of claim is adequately pleaded*

It was submitted that at para 12 of the statement of claim, the plaintiff/respondent had claimed RM4,112,715.81 under the second facility agreement consisting of RM3,394,157.35 as principal and RM718,558.46 as interest as at 27 June 1996. At para 21 of the statement of claim, the plaintiff/respondent claimed RM2,240,753.63 consisting of RM1,869,600.17 as principal and RM371,153.46 as interest as at 27 June 1995. On this total of RM6,353,469.44, the plaintiff/respondent prayed for interest at 10% pa from 28 June 1995. This was allowed by the SAR. The appellants argued that the statement of claim had failed to adequately particularize the mode of computation of interest and the rate of interest and the time period for which interest was levied for each of the amounts claimed under the second and third facility agreements. It was thus contended that there was no way of ascertaining whether the interest claimed was actually due. The appellants relied on *Bajaj Textiles Ltd v Gian Singh & Co Ltd* [1971] 2 MLJ 133 which held that a claim on a running account would be insufficient as a matter of pleading unless particulars were given either of an account stated (the parties having agreed to the amount outstanding) or of the mutual transactions from which the outstanding balance arose. Relying on this case, the appellants contended that in the present case it was not pleaded nor was it shown how and at what rate and for which period interest was charged to justify the amount claimed. It was argued that this was particularly important as the 'default interest' charged both under the second and third facility agreements stipulated that 'default interest' means the rate of interest chargeable on all overdue sums calculated at the rate of 5% pa over and above the average base lending rates ('BLR') of three major local commercial banks.

- H The appellants submitted that there was a clear failure to specify the rate of interest that was used to arrive at the amount claimed. It was pointed out that in both facility agreements the interest clause specified the interest payable to be such rate as may be stipulated by Bank Negara from time to time. It was a further stipulation that if the borrower shall fail to pay any amount in accordance with the agreement, the borrower shall pay interest on that amount from the date of default up to the date of actual payment at the 'default rate' or such other rate as the bank may from time to time designate, such designation to be notified to the borrower. It was the argument of the appellants that the plaintiff/respondent had
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failed to plead which rate of interest that was applied, whether it was the normal interest rate and if so at what rate and on what sum and for which period of time and whether it was compounded or whether the default rate was applied and if so at what rate and on what figure and for which period of time. The appellants submitted that the plaintiff/respondent had failed to show any designation of default interest to the first defendant which meant that the default interest stated in the agreement applied and in which case the plaintiff/respondent must show what the average BLR of three major local commercial banks was, at the various points of time interest was chargeable. And on this basis, the appellants asked a rhetoric question as to the manner of assessing a 'major local commercial bank' because a bank that was placed high in term of assets ranking could be placed low in terms of profitability. In the circumstances, it was urged upon me that the default interest clause was not enforceable for uncertainty and reliance was placed on s 30 of the Contracts Act 1950 ('the Act').

In response to this issue, the plaintiff/respondent argued that the basic principle of pleadings is that only material facts are to be pleaded, not evidence. The plaintiff/respondent set out in its written submission the paragraphs in the statement of claim which pleaded interest.

In respect of the second facility in para 6 of the statement of claim, the plaintiff/respondent has set out the clause giving the right to interest and the contractual term relied on and the rates of interest are pleaded in detail. The rates of interest and the mode of computation of interest were also set out. In para 12 of the statement of claim, the plaintiff/respondent also set out the sum due under the second facility with interest at the rate of 10% pa. The principal sum was also set out in para 12 and all maturity dates for each amount on the second facility was clearly set out in Annexure I of the statement of claim.

With regard to the third facility, the plaintiff/respondent had in para 15 of the statement of claim set out the clause giving the right to interest and the contractual term relied on and the rates of interest are pleaded in detail. Just as in the case of the second facility, the rates of interest and the mode of computation of interest was also set out. In para 21 of the statement of claim the plaintiff/respondent also set out the sum due under the third facility with interest at the rate of 10% pa. The principal sum was also set out in para 21 and all maturity dates for each amount on the third facility was clearly set out in Annexure II of the statement of claim.

It was further submitted that the appellants in their affidavit did not say that they did not know what the sum claimed against them was or that they could not ascertain what was due. Their allegation was that the plaintiff/respondent did not give the first defendant notice of increase in the interest rate. The plaintiff/respondent had replied in its affidavit that with regard to the default interest, the rate of interest had decreased from 11% to the 10% pa that is being claimed and that all notice of increase in loan interest rates as stipulated by Bank Negara had been given to the first defendant with two of the said notice addressed to the second defendant. It was further submitted that since the second, third and sixth defendants

A did not deny these averments of the plaintiff/respondent, they are deemed to have admitted them and reliance was placed upon the dicta of Gopal Sri Ram JCA in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 286.

B With regard to the appellants' challenge as to how one is to assess three major commercial banks, it was submitted that there was no challenge taken by way of affidavits on this issue for the plaintiff/respondent to reply to. In reply to the *Bajaj Textiles* case, the plaintiff/respondent argued that the said case related to pleadings on a running account and that in any event, it was held in that case that the pleadings was sufficient, whereas the
C action in the present case related to banking facilities, and not a running account. The plaintiff/respondent also relied on the conclusive evidence clause in the guarantee agreement to bind the second, third and sixth defendants.

D Having considered both views and the reply of the appellants which was a reiteration of their earlier submission, I find that the statement of claim had indeed been adequately pleaded. The plaintiff/respondent had pleaded the contractual terms regarding interest on which it relies in full including the rates and mode of computation, the principal amounts due on each facility claimed, the interest charged thereon until 27 June 1995 and that the rate on the sums due under the second and third facilities is
E 10% pa from 28 June 1995 to date of payment. It is difficult to see what the complaint of the appellants is because to my mind the amount being claimed against them is quite clear. It is my view that to plead anything more would be tantamount to pleading evidence. In *Sundaram v Chew Choo Khoo* [1968] 2 MLJ 153, the court held that in pleading facts other than the actual rate of interest charged and in pleading the negotiations
F which took place between the defendant and the plaintiff's brother, the plaintiff was pleading evidence and not material facts. Further the appellants are directors of the first defendant and must be deemed to have knowledge of the company's borrowings and debts. In *Ban Hin Lee Bank Bhd v Jashbhai Nagjibhai Patel* [1992] 1 CLJ 98, Mohamed Dzaidin J (as he then was) held that the fact that the rate of interest was left blank did not
G preclude the plaintiff from claiming interest as pleaded in the statement of claim as it was provided in the letter of guarantee that the interest rate could be determined by the plaintiff at a lower or higher rate from time to time and that as the defendant was a director of the principal debtor, he must be deemed to have knowledge of the company's borrowings and
H debts. Besides, proper notices of increase in loan interest rate as stipulated by Bank Negara had been given to the first defendant and copies sent to the attention of the second defendant. Since there was no denial of these averments of the plaintiff/respondent and on the authority of *Ng Hee Thoong*, I find that the appellants are deemed to have admitted them.
I However, the second, third and sixth defendants signed the second and third individual guarantees as directors of the first defendant. Whether or not they were directors, they would know full well the terms of the second and third facility agreements, especially the clause that defines default interest as being 5% over the average BLR of three major local commercial

banks. Furthermore, when the actual rate as calculated at 10% pa was set out and averred further in the plaintiff's/respondent's affidavit and there is no response to the same, the appellants are deemed to have admitted the said averments of the plaintiff/respondent. In any case, when the first defendant took the banking facilities and the appellants stood as guarantors for the same, they accepted the imposition of the default interest clause as set out and defined in the second and third facility agreement. I also find that *Bajaj Textiles'* case has no relevance to the case before me on the basis that the present case deals with banking facilities and not relating to a running account. I had held in *Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors* [1996] 4 MLJ 556 that the presence of a conclusive evidence clause per se could not prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them. However, if the conclusive evidence clause is to be disputed, then there ought to be a proper challenge taken, since the existence of such a clause is prima facie evidence of the debt due. As the second, third and sixth defendants had not alleged nor shown any grounds to vitiate the certificate of indebtedness, I hold the said certificate of indebtedness as conclusive of the sums owed by the appellants. Further under cl 13 of the second individual guarantee, the second, third and sixth defendants had agreed that any admission or acknowledgement by the first defendant borrower or by a person authorized by the borrower or any judgment against the first defendant or borrower shall also be conclusive as against the second, third and sixth defendants in respect of the indebtedness due from then. It is to be noted that judgment was obtained against the first defendant on 28 March 1996 and this is conclusive as against the second, third and sixth defendants.

(b) *Whether the guarantee dated 16 April 1990 is void for uncertainty*

It was submitted by the appellants that the guarantee dated 16 April 1990 executed by the second defendant at its recital refers to a facility agreement which was undated save and except for the year which was stated to be 1989. The sum claimed under the third facility agreement is for RM2,240,753.63, but that agreement was dated 16 April 1990. Therefore, it was argued that there was a doubt as to whether the letter of guarantee dated 16 April 1990 was intended to secure the third facility agreement.

In reply, the plaintiff/respondent submitted that there was no uncertainty at all as to which facility was being secured by the third individual guarantee. It was pointed out that the second, third and sixth defendants had not said in their affidavits that they do not know what agreement is referred to in the recital. In fact, to the contrary, the second, third and sixth defendants had admitted in their respective affidavits that the third facility was granted to the first defendant and have also admitted signing the third individual guarantee. Besides, it was argued by the plaintiff/respondents that the recital to the guarantee clearly stated that at the request of the guarantors the bank had agreed to grant and continue to make available to the first defendant an additional revolving pre-shipment

A and post-shipment supplier's credit of RM2,000,000. It was quite clear therefore that the second, third and sixth defendants had requested that the first defendant be granted this facility of RM2,000,000 and that it was this sum that they had guaranteed to pay as set out in the third individual guarantee.

B This court having analysed the evidence offered on this issue and also having considered the reply of the appellants who contended that the onus was on the plaintiff/respondent to prove that the guarantee in fact related to that particular facility, I am more than satisfied that the second, third and sixth defendants knew that they were guaranteeing the third facility agreement even if the date of the agreement was not filled in the recital. I
C hold that there is no substance in the second, third and sixth defendants' submission that there is a doubt. It is not enough to merely state that doubt arises especially when the said defendants' own affidavits speak otherwise. To my mind, there is no issue to be tried on this when it is obvious from the documents before this court that the appellants knew
D what the facility was that they were standing guarantee for. In any event, cl 19 of the said guarantee agreement clearly covers 'all monies ... owing by the borrower'. (Emphasis added.) In any event, the appellants — being directors of the first defendant — are deemed to have knowledge of the company's borrowings and debts when they signed the guarantees. See *Ban Hin Lee Bank Ltd.*

E (c) *Whether the third defendant is discharged from the letters of guarantees dated 31 January 1989 and 16 April 1990*

The third defendant averred in his affidavit in reply (encl 22) that, sometime at the end of 1992, he had discussed with the plaintiff/respondent that he
F wished to be released as a guarantor from all guarantees he had executed and that he was verbally informed by an officer of the plaintiff/respondent that the plaintiff/respondent had no objections. It was contended that a reply dated 6 November 1992 was sent to the third defendant's solicitors from the plaintiff/respondent. However, the disputed portion of the letter reads:

G We regret to inform you that we do consent to discharge your client, Mr Chung Choon Huat as a guarantor.

The plaintiff/respondent contended that the words 'we do consent' meant 'we do not consent' and put in a statutory declaration by the signatory of
H the said letter, to that effect. However, it was submitted on behalf of the third defendant that the word 'regret' should read as 'write' and this, it is suggested, is a triable issue requiring the author of the said letter to be cross-examined. In any event, in the alternative, counsel submitted that even if what the plaintiff/respondent contended was correct, this meant that as at 6 November 1992, that is from the date of the plaintiff's/
I respondent's letter, the plaintiff/respondent has had notice from the third defendant that he intended to revoke the guarantees executed by him for the benefit of the first defendant and that pursuant to s 83 of the Act, this constituted a revocation of the continuing guarantee.

In its reply, the plaintiff/respondent refuted the interpretation that the third defendant placed upon its letter dated 6 November 1992. In addition to the statutory declaration made by the signatory to the letter that the word 'not' was inadvertently omitted from the said letter, the plaintiff/respondent also referred me to exh B1-32 which was a letter from the plaintiff/respondent to the first defendant's company secretary dated 23 August 1993 to the effect that the plaintiff/respondent continued to hold the third defendant 'as one of the unconditional joint and several guarantors for the facilities granted' to the first defendant.

As to the application of s 83 of the Act, the plaintiff/respondent stated that there was no letter dated 6 November 1992 received from the third defendant to the plaintiff/respondent.

Having considered the submissions of both parties and the reply of the third defendant, I find that the word 'not' was inadvertently omitted before the word 'consent' in the letter dated 6 November 1992. The suggestion of the third defendant that the word 'regret' should read 'write' seeks to achieve the purpose intended by the third defendant, but does not seek to translate the true intent and meaning of the said letter. I dismissed this argument as having no merit. As for the third defendant relying on s 83 of the Act that the guarantee has been revoked, it is my finding that for this court to consider the applicability of s 83 of the Act, the same ought to have been raised in any of the affidavits. In any event, even if I am to consider this section, it is my finding that there cannot be any arbitrary revocation by the third defendant in the absence of any concurrence by the bank which has specifically denied such concurrence.

(d) *Whether the letters of demand dated 13 July 1995 from the plaintiff's solicitors and the plaintiff dated 28 July 1995 constituted a valid and effective demand*

The appellants submitted that in both letters — the letter of demand dated 13 July 1995 from the plaintiff's/respondent's solicitors, and the one dated 28 July 1995 from the plaintiff/respondent — the amount demanded was RM8,067,300.88 under all the three facility agreements which totalled the principal and interest due thereunder. It was the contention of the appellants that the plaintiff/respondent had demanded for a sum in excess of the sum claimed in this suit and that the demand was improper. The appellants relied on *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283. In that case, the plaintiff issued a notice of demand in Form 16D of the National Land Code 1965 to the defendant. There were inconsistencies regarding the amount that the plaintiff said was owing to them. It was argued by the defendant that the plaintiff was not entitled to charge default interest since it had not given any notice pursuant to cl 5 of the charge annexure which provided that such notices shall be given before the default interest could be imposed. It was held that the wrongful demand for payment of default interest to which the plaintiff was not entitled must necessarily render the notice of demand and the notice in Form 16D ineffectual and invalid.

A It was submitted that in the present case the plaintiff/respondent had failed to give notice to the first defendant as to the default interest charged and demanded from the sixth defendant sums allegedly owing under the first facility agreement to which the sixth defendant did not stand guarantee. Further, the letter of guarantee for the first facility agreement dated 13 August 1988 expressly stipulated that the liability of the guarantors are 'in proportion mentioned in s 3.7' which is a non-existent clause. Therefore, it was argued doubts arose as to whether the liability of the guarantors are really joint and several and whether the first guarantee is void for uncertainty. The appellants relied heavily on the unreported Australian case of *Donnelly v National Australian Bank* discussed in *The Modern Contract of Guarantee* by Dr John Phillips and Dr James O'Donovan (1992) at p 422. In that case the Full Court of the Supreme Court of Western Australia granted the guarantors unconditional leave to appeal against a summary judgment in favour of the respondent bank. It held that the bank's demand should have specified the correct amount owing or otherwise provided the appellants with sufficient information to enable them to ascertain the amount. D Moreover, the guarantee provided that interest was to be 'calculated in the manner and at the rate or rates determined by the bank for the time being, compounded and turned into principal accordingly'. It was urged upon me to see the similarity of *Donnelly's* case to the case before me, particularly to the provision regarding interest, default interest and the right to compound interest. E

In reply, the plaintiff/respondent submitted that in para 4 of both the letters of demand, the principal and interest due under each of the three facilities has been set out separately and the sum due under each facility has been clearly identified. The principal and interest due under each of the three facilities add up to a total of RM8,067,300.88 as at 27 June 1995. It was pointed out in the submission that as this action was only in respect of the second and third facilities, naturally, the sum claimed in the statement of claim refers to only the principal and interest under the second and third facilities and does not include the sum due under the first facility. The plaintiff/respondent had pleaded in the statement of claim that it proposed to file a separate suit for the first facility. It was thus submitted that there was no claim in excess at all. In reply to *Co-operative Central Bank's* case, the plaintiff/respondent argued that the case was irrelevant as the demands in the case before me were not excessive. It was also submitted that the case was not authority for the proposition that an excessive demand invalidates a notice of demand. In response to *Donnelly's* case, the plaintiff/respondent argued that in that case, it was held that the letter of demand should have stated the correct amount owing or otherwise provided the appellants with sufficient information to enable them to ascertain the amount. In the present case, all details of the amount due under principal and interest had been specifically set out for each facility. H In reply to the allegation that no notice of default interest was given, the plaintiff/respondent submitted that this was adequately rebutted in its affidavit and that there was no response to the same from the appellants. I With regard to the issue relating to the liability of the sixth defendant for

the first facility agreement, the plaintiff/respondent submitted that by virtue of cl 19 of the second and third individual guarantees, in consideration of the plaintiff/respondent granting the said facilities, the sixth defendant agreed that the guarantee was a continuing guarantee to guarantee all moneys whatsoever 'now or from time to time' owing to the plaintiff/respondent. Therefore, it was submitted that the sixth defendant had guaranteed payment of sums due under the first facility. In any event, this action is not on the first facility.

In analysing the submissions of both counsel and examining the documents, it is apparent to me that in both the letters of demand the principal and interest due under each of the three facilities have been set out separately. The demand made was for three separate facilities, the amounts under each being clearly identified. Out of the three, this action relates to only two of the said facilities and whereas the plaintiff/respondent has also clearly pleaded in the statement of claim that in respect of the first facility, the plaintiff/respondent intended to file a separate action to recover the sums due under the said first facility. In the circumstances, the contention of the appellants that the plaintiff/respondent had demanded a sum in excess of that claimed is as unmeritorious as is a bare denial to an action.

In respect of *Co-operative Central Bank's* case, there were two arguments raised by the defendant: (i) that the sum mentioned in the notice of demand and the statutory Form 16D exceeds the actual sum due and payable by the borrower; and (ii) that the plaintiff had not established their entitlement to default interest. Regarding (i), the learned judge rejected the contention of the defendant by relying on the principles enunciated in *Burnsbury Foods Pty Ltd v National Bank of Australasia Ltd* (1983) 153 CLR 491 and *Public Bank Bhd v Chan Siok Lie & Ors* [1989] 2 MLJ 305. In *Burnsbury's* case, the principle set out is that the interest of the parties will be more adequately protected if the debtor be allowed a reasonable opportunity to comply with the demand before the creditor can enforce or realize the security, than the adoption of the suggested proposition that the notice of demand must specify the amount of the debt. In determining whether the debtor has had such an opportunity, it will be relevant to take into account of the debtor's knowledge, lack of knowledge and means of knowledge of the amount due and of the information which the creditor has provided in that respect, including the response which he has made to any inquiry by the debtor. In *Public Bank's* case, the court held that there is no general rule that in all cases, unless the precise amount owing is correctly stated in the notice, the notice will be invalidated. In *Co-operative Central Bank's* case, Lim Beng Choon J hastened to add that in arriving at his conclusion in adopting the abovestated principles he was not saying that in no circumstances can a chargor challenge a notice of demand. He said at p 286:

He can certainly mount a challenge if he or the borrower (in the case of a third party charge) is in a position to pay off the sum demanded and wishes to know the exact and precise sum and he had communicated with the creditor and asked the creditor what sum he was required to pay.

A I hold that in the present case where the amounts due on the principal and interest are all separately set out for each facility in the two letters of demand, the appellants are in a position to know exactly what is being demanded of them in respect of the said facilities. I further hold that they just ignored the notices and did nothing. With regard to point (ii) of *Co-operative Central Bank's* case, the court held that the bank was not entitled to the default interest claimed and for this reason the notice were held bad. In the present case the issue is quite different. The plaintiff/respondent has not demanded anything it is not entitled to. In answer to *Donnelly's* case, I agree with the submission of the plaintiff/respondent.

C (e) *Whether the guarantees dated 31 September 1989 and 16 April 1990 are voidable having been obtained as a result of misrepresentation*

D It was the submission of the appellants that when the second, third and sixth defendants executed the guarantees, they had enquired from the plaintiff's/respondent's solicitors attending to them the meaning of 'joint liability' and were advised that they could seek contribution from the other guarantors, including Huston Electronics Co Ltd of Taiwan. However, they were not advised that the other guarantors being Taiwanese are beyond the jurisdiction of the Malaysian courts once they leave this country. The appellants complained that they would not be able to enforce any judgment given by a Malaysian court in Taiwan as there is no agreement for the reciprocal enforcement of judgment and it was their submission that they had not been advised of the consequences of having persons who are beyond the jurisdiction of this court as joint guarantors. The appellants relied on *Malayan Banking Bhd v Kim Produce Pte Ltd & Ors and another action* [1991] 2 MLJ 448 which held that where a guarantee did not have the benefit of independent legal advice in a situation where there had been inequality of bargaining power, he was absolved from all liability as the guarantee was obtained as a result of misrepresentation. It was thus urged upon me that I ought to allow this appeal as the appellants had raised triable issues.

G In reply, the plaintiff/respondent argued that in addition to being jointly liable, the appellants were also liable as principal debtors and pursuant to cl 23(c) and 25 of the second and third individual guarantees, were also severally liable. Therefore, it was submitted that the issue of joint guarantors was totally irrelevant. As for the issue of misrepresentation, it was argued that the plaintiff's/respondent's solicitors were not under a duty to advise the appellants as they only acted for the plaintiff/respondent. H It was further argued that nowhere in the affidavits did the appellants state that they relied on the plaintiff's/respondent's solicitors advice nor did they raise the issue of inequality of bargaining power. In the circumstances, it was submitted that the rationale of *Malayan Banking's* case was irrelevant to the present case.

I It is my considered view that this last issue raised by the appellants is also devoid of merit. Since the plaintiff/respondent's solicitors were not representing the appellants, there was no legal duty on them to advise the appellants. Besides, if such was the situation which led to the appellants

being misrepresented, the appellants would have or ought to have protested this fact at the earliest opportunity or at least raise it in the affidavits to enable the plaintiff/respondent to rebut. They ought not to have raised it during the submission without any basis. It is my judgment that in an attempt to show as many issues as may be possible, the appellants have raised this baseless issue. A

Adopting the approach taken by the Court of Appeal in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, where Gopal Sri Ram JCA adopted the approach taken by Hashim Yeop Sani SCJ in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 at p 185, I find that the plaintiff/respondent herein is clearly entitled to the money and I find that there is no fairly arguable defence to the claim. B
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There is no doubt in my mind that the plaintiff/respondent is entitled to judgment.

I therefore dismissed the appeal with costs.

Appeal dismissed. D

Reported by Khoo Chuan Swee

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